

Supreme Court, U. S.

FILED

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MICHAEL RODAN, JR., CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-115

VINCENT J. BERNABEI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

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UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on June 29, 1976.

OPINIONS BELOW

The opinion of the United States District Court was filed August 25, 1975, which is included in the attached Appendix.

The Order of the United States Court of Appeals dismissing the Appeal of the Petitioner was entered on June 29, 1976. A copy of said opinion is included in the attached Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered June 29, 1976. The jurisdiction of this Court is invoked under 28 USC 1254 (1).

QUESTION PRESENTED

Was the Petitioner denied his Constitutional right to a fair trial when the trial Court excluded defense evidence of financial and domestic problems to prove that his failure to file an income tax return was not willful?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States 26 USC Section 7203.

STATEMENT OF FACTS

Vincent J. Bernabei is a lawyer about 50 years of age who practices in Canton, Ohio. During the years here involved, 1965 through 1968, he was married and the father of five minor children. Finally, in 1968, after years of domestic turmoil which affected his financial condition, he was divorced. Subsequently, he remarried, and now has two minor children from the second marriage.

Petitioner in May, 1972 was convicted by a jury of four counts of wilful failure to file federal income tax returns and sentenced to four years imprisonment and fined \$20,000.00.

During the trial, the Court refused defendant the opportunity to introduce evidence of his marital and financial difficulties — by which evidence he would have offered proof that he had no evil motive for his failure to file

income tax returns and, therefore, was guilty of no *criminal* offense. The trial Court held that the evidence of the domestic and financial problems was not relevant to the issue of willfulness. On appeal, this Honorable Court sustained the finding of the District Court on February 28, 1973.

On May 29, 1973, the Supreme Court, in *United States v. Bishop*, 412 U.S. 346, clarified the law on proof of willfulness in a misdemeanor tax case, holding that the word "willfully" used in the tax statutes has the same meaning as in felony tax violations. Although the Bernabei case was then pending in the Supreme Court on a Petition for Writ of Certiorari, the Supreme Court denied his petition on October 9, 1973, and denied rehearing on November 19, 1973.

On July 25, 1975, Petitioner filed a motion to vacate judgment and sentence under 28 USC Section 2255. The motion was based on the decision of the United States Supreme Court in *United States v. Bishop*, 412 US 346, 93 S.Ct. 2008 (1973) holding that proof of willfulness in a tax misdemeanor violation requires the same quantum of proof as that in a tax felony violation and that the exclusion of his proffered evidence in the trial Court entitled him to a new trial.

The District Court denied the motion on August 25, 1975, and denied rehearing on September 11, 1975. On September 15, 1975, petitioner filed a notice of appeal from the judgment order of the District Court. After hearing, the Court of Appeals affirmed judgment of the District Court on June 29, 1976.

REASONS FOR GRANTING WRIT

I.

Since the decision of this Court in *United States v. Bishop*, supra, most of the Circuit Courts have been requiring proof of willfulness by positive evidence to establish that element of the offense beyond a reasonable doubt. Most trial Courts have been permitting the defense to present evidence which might explain reasons for failure to file income tax returns due to something other than criminal willfulness. In *United States v. Pohlman*, 75-1 USTC 9228 (CA 8), the Court held that in a trial for willful failure to file income tax returns the jury should consider the defense that defendant, a woman attorney, was so occupied with her professional and social duties that her failure to file was due to negligence and not criminal willfulness.

In *United States v. Bengiamina*, 74-2 USTC 9513, 499 F2 117 (CA8 1974), the Court reversed a conviction on the ground that the Court's instructions to the jury failed to properly define the meaning of the word "willfully" in a tax misdemeanor statute involving failure to file a tax return. The Court relied on *Bishop* supra in holding that the meaning of the word "willfully" in tax misdemeanor statutes has the same meaning as in a felony violation.

In *United States v. Sterling Berg* the United States District Court, District of South Dakota, Southern Division, 75-1 USTC 9198, the Court found the defendant not guilty on the grounds that the evidence showed that the defendant doctor was guilty of only negligence and carelessness in not filing his tax returns and that his behavior was not sufficient to show willfulness beyond a reasonable doubt. Obviously, Dr. Berg was allowed to present evi-

dence of carelessness and negligence to overcome any inference of willfulness.

Petitioner Bernabei proffered to the trial Court evidence of extreme financial and marital difficulties to overcome any inferences of willfulness in failing to file his tax returns, but the trial Court excluded this evidence.

II.

It appears to be a matter of great public interest that, in prosecutions of taxpayers for willfully failing to file income tax returns, defendants be allowed to present evidence which might contradict proof of willfulness. It appears that this problem may be recurring frequently in the Circuits where this type of evidence is being excluded and it naturally is of great importance to defendants whose liberty is placed in jeopardy.

There is a conflict between the Court of Appeals on the question raised by this case. The Sixth Circuit Court of Appeals has held that the law established in *United States v. Bishop*, 412 US 346, is not applicable to cases such as this, whereas the Eighth Circuit Court of Appeals has held that the decision in the *Bishop* case does apply to willful failure to file tax cases.

In view of the importance of the question here involved, it is submitted that this Writ of Certiorari should be granted.

CONCLUSION

In conclusion, for the reasons stated, the petitioner respectfully prays that this petition for Writ of Certiorari be granted.

Respectfully submitted,

JOHN KENNEDY LYNCH
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

NO. 75-2239

UNITED STATES OF AMERICA,
Respondent-Appellee,

v.
VINCENT J. BERNABEI,
Petitioner-Appellant.

ORDER

(Filed June 29, 1976)

Before: PHILLIPS, Chief Judge, and EDWARDS and
PECK, Circuit Judges.

Petitioner-appellant was found guilty by a jury of four counts of the misdemeanor of willfully failing to file income tax returns under 26 U.S.C. § 7203. On appeal, that judgment of conviction was affirmed. 473 F.2d 1385 (6th Cir.), *cert. denied*, 414 U.S. 825, 94 S. Ct. 130, 38 L.Ed. 2d 59 (1973). Subsequently, appellant moved for a new trial and appealed the order of denial entered in the district court, resulting in orders of affirmance. No. 74-2043, 6th Cir., entered December 19, 1974, and May 16, 1975, *cert. denied*, — U.S. —, 96 S. Ct. 63, — L.Ed.2d — (1975).

The instant motion is to vacate judgment and sentence under 28 U.S.C. § 2255. In the direct appeal hereinabove mentioned we rejected appellant's claim that "the trial judge erred in refusing to permit him to introduce evidence of marital and financial difficulties" because such evidence is "not relevant to the issue of willfulness as the term is used in the statute" In the present action, appellant contends that *United States v. Bishop*, 412 U.S. 346, 93 S. Ct. 2008, 36 L.Ed.2d 941 (1973), requires the granting of a new trial at which he should be permitted to offer the referenced evidence. We conclude that *Bishop* is distinguishable from the present case on the facts, and accordingly,

IT IS ORDERED that the judgment of the district court be and it hereby is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN,
Clerk

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. CR72-63

UNITED STATES OF AMERICA,
Plaintiff,

v.

VINCENT J. BERNABEI,
Defendant.

ORDER

(Filed August 25, 1975)

KRUPANSKY, J.

This is a proceeding to vacate sentence instituted pursuant to 28 U.S.C. § 2255.

Defendant, Vincent J. Bernabei, was convicted by a jury of five counts of willful failure to file federal income tax returns in May, 1972, sentenced to four years imprisonment and fined \$20,000. Immediately thereafter, defendant filed a Notice of Appeal and Motion for Stay of Execution of Sentence, which Motion was granted by this Court.

Defendant's conviction was affirmed by the Sixth Circuit Court of Appeals on February 28, 1973. *Bernabei v. United States*, 473 F.2d 1385 (6th Cir. 1973):

. . . appellant contends principally that the trial judge erred in refusing to permit him to introduce evidence

of marital and financial difficulties, as to which profers were made. It is his contention that in failing to file the returns in question he "had no evil motive . . . , but due to pressures and stress, neglected, without any criminal intent, to file his returns when due." It is here concluded that evidence of financial and domestic problems are not relevant to the issue of willfulness as the term is used in the statute under which appellant was charged and in the indictment, and that the evidence was properly excluded. *Id.* at 1385.

Defendant's petition for certiorari, 94 S.Ct. 130, and rehearing, 94 S.Ct. 556, were thereafter denied by the United States Supreme Court on October 9, 1973 and November 19, 1973 respectively. Subsequent thereto, defendant was remanded to the custody of the Warden of Mahoning County Jail on April 1, 1974.

On January 14, 1974, defendant moved this Court for a new trial on the basis of newly discovered evidence, pursuant to Rule 33, Fed. R. Crim. P., asserting certain improprieties in the selection of the jury in contravention of the Jury Selection and Service Act of 1968, as amended, 28 U.S.C. § 1861 *et seq.*, and this Court's local jury plan promulgated pursuant thereto. Defendant's subsequent Motion for Stay of Execution of Sentence was thereafter granted by this Court and defendant was released from the custody of the Warden of Mahoning County Jail on April 4, 1974 pending a final ruling on defendant's Motion for New Trial.

Pursuant to a full hearing on the merits of defendant's allegations, his Motion for New Trial was denied on May 22, 1974, at which time defendant was further Ordered to report to the United States Marshal to commence serving the sentence imposed by this Court on May 19, 1972. Immediately thereafter, defendant filed a Notice of Appeal

and Motion for Stay of Execution of Sentence, which Motion was granted by this Court on June 10, 1974.

Defendant's appeal of this Court's Order denying his Motion for a New Trial attempted to collaterally raise before the Sixth Circuit, once again, the propriety of this Court's refusal to admit evidence of his marital and financial difficulties as they related to the issue of willfulness. Defendant asserted therein that the intervening United States Supreme Court decision in *United States v. Bishop*, 412 U.S. 346 (1973), effectively overruled the Sixth Circuit's prior affirmance of his conviction herein, 473 F.2d 1385 (6th Cir. 1973).

On December 19, 1974, the Sixth Circuit Court of Appeals granted the Government's Motion to Dismiss defendant's collateral attack upon this Court's evidentiary ruling. This Court's Order of May 22, 1974 denying defendant's Motion for New Trial was thereafter affirmed by the Sixth Circuit on May 16, 1975.

Defendant's instant § 2255 application presents the identical issues he attempted to raise previously before the Sixth Circuit, namely, that the intervening decision of the United States Supreme Court in *United States v. Bishop*, 412 U.S. 346 (1973) overruled the Sixth Circuit's February 28, 1973, affirmance of his conviction herein.

Although the Court seriously questions defendant's status as "a prisoner in custody under sentence of a court" consistent with the jurisdictional prerequisites of 28 U.S.C. § 2255, *See Heflin v. United States*, 358 U.S. 415, 79 S.Ct. 451 (1959); *United States v. Hayman*, 342 U.S. 205, 72 S.Ct. 263 (1952); *McNally v. Hill*, 293 U.S. 131, 55 S.Ct. 24 (1934), the Court, desired to afford defendant an expeditious determination on his pending motion, and in the interests of justice, elects to proceed upon the merits of this cause.

Defendant was convicted by a jury in May, 1972, of five counts of willful failure to file federal income tax returns. His appeal therefrom was affirmed by the Sixth Circuit on February 28, 1973, and his petitions for certiorari and rehearing were subsequently denied by the United States Supreme Court on October 9, 1973 and November 19, 1973 respectively. The case upon which defendant relies, *United States v. Bishop, supra*, was decided by the United States Supreme Court on May 29, 1973.

It is obvious to this Court, as it was to the Sixth Circuit Court of Appeals in its refusal to permit defendant to collaterally prosecute this issue on appeal of this Court's denial of his Motion for New Trial, that the *Bishop* case, decided prior to defendant's petitions for certiorari and rehearing before the United States Supreme Court, was thoroughly reviewed therein prior to denial of said petitions, and found inapplicable.

The substance of defendant's present Motion having already been determined adversely to defendant by the United States Supreme Court and the Sixth Circuit Court of Appeals, said Motion is hereby denied.

Defendant's additional Motion for Stay of Execution of Sentence pending ruling on his Motion to Vacate Judgment is moot. Accordingly, It is ORDERED that defendant shall report to the United States Marshal within twenty (20) days of entry of this Order to commence serving the sentence imposed by this Court on May 19, 1972.

IT IS SO ORDERED.

/s/ Robert B. Krupansky
United States District Judge

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. CR72-63

UNITED STATES OF AMERICA,
Plaintiff,

v.

VINCENT J. BERNABEI,
Defendant.

ORDER

(Filed September 11, 1975)

Upon consideration, the motion of defendant Bernabei for reconsideration and/or rehearing of this Court's Order dated August 25, 1975 denying his motion to vacate sentence is hereby denied.

IT IS SO ORDERED.

/s/ Robert B. Krupansky
United States District Judge

Supreme Court, U. S.
FILED

SEP 16 1976

MICHAEL ROBAX, JR., CLERK

No. 76-115

In the Supreme Court of the United States

OCTOBER TERM, 1976

VINCENT J. BERNABEI, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-115

VINCENT J. BERNABEI, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

For the third time, petitioner seeks review of his conviction for willful failure to file income tax returns. He renews his contention, first made on direct appeal, that the trial court erred in excluding evidence of his financial and marital problems during the prosecution years.

After a jury trial in the United States District Court for the Northern District of Ohio, petitioner was convicted of willful failure to file tax returns, in violation of 26 U.S.C. 7203. The trial court sentenced him to a prison term of four years, four months of which were to be served in a jail-type institution and the remainder suspended in favor of probation. Petitioner was also fined \$20,000. The court of appeals affirmed petitioner's conviction (473 F. 2d 1385), and this Court denied certiorari (414 U.S. 825). Petitioner thereupon moved in the district court for a new

trial. On appeal from the denial of his motion, the court of appeals dismissed the appeal and this Court denied certiorari (Pet. App. 1a; 423 U.S. 837). Petitioner thereupon commenced this proceeding for review of his conviction under 28 U.S.C. 2255, and the court of appeals reaffirmed his conviction by order (Pet. App. 1a-2a).

The government's proof at trial showed that petitioner, an attorney, realized gross income of \$30,557 in 1965, \$25,206 in 1966, \$30,126 in 1967, and \$31,903 in 1968 (Tr. 95-97),¹ and that he filed no income tax returns for those years (Tr. 230-231). Petitioner admitted that he knew during the prosecution years that he was required to file the returns but testified that the reason he did not file the returns was that he did not have the money to pay the tax (Tr. 223, 230, 237). Petitioner further admitted during the investigation that he knew the returns could have been filed without paying the taxes due and that he had advised the Treasury agents that he did not do so because he wanted to avoid tax liens (Tr. 172).

Petitioner was also asked, on direct examination by his counsel, about certain financial transactions occurring prior to the prosecution years (R. 28).² Upon objection by the government, petitioner's counsel asserted that he intended to develop testimony respecting "a series of financial difficulties and a series of marital difficulties" (R. 29). The trial judge asked how these difficulties were material, and petitioner's counsel replied only that the "financial pressures, pressures of creditors * * * reflect on the lack of any evil motive" (*ibid.*). The court then ruled (R. 33):

¹"Tr." refers to the trial transcript.

²"R." refers to the record appendix filed in the court of appeals.

* * * a lack of funds or an inability to pay does not constitute reasonable cause for failure to file declarations or estimates of tax returns. Therefore, any evidence relative to inability to pay or lack of funds will be excluded.

Petitioner contends that the trial court erred in rejecting his offer of proof. We note at the outset that petitioner's collateral attack upon evidentiary rulings at his trial does not present a claim cognizable upon collateral attack of his conviction. See *Davis v. United States*, 417 U.S. 333, 346.

In any event, his offer of proof was irrelevant to the issue of willfulness in the context of this case. Willfulness, under the tax misdemeanor and felony statutes, consists of "a voluntary, intentional violation of a known legal duty." *United States v. Bishop*, 412 U.S. 346, 360. Although evidence of inability to pay might possibly be relevant to willfulness in cases where a defendant established that he had a good faith belief that he could not lawfully file without paying the tax (see *Yarborough v. United States*, 230 F. 2d 56 (C.A. 4), certiorari denied, 351 U.S. 969), petitioner made no such claim. To the contrary, petitioner conceded knowledge of a legal duty to file and admitted deliberately failing to file merely in order to avoid paying the tax.

Similarly, evidence of emotional distress engendered by marital difficulties might be relevant to a defense based upon inadvertence or negligence (see *United States v. Gorman*, 393 F. 2d 209 (C.A. 7), certiorari denied, 393 U.S. 832), but petitioner never relied upon or suggested such a defense at trial. In the absence of such a defense, evidence of emotional distress is irrelevant and may be excluded. *United States v. Haseltine*, 419 F. 2d 579 (C.A. 9).

United States v. Bishop, supra, does not support petitioner's claim. The holding of *Bishop*, so far as relevant here, is that the word "willful" as used in tax misdemeanor statutes has the same meaning as the same word used in tax felony statutes, *i.e.*, a "voluntary, intentional violation of a known legal duty" (412 U.S. at 360). As for the phrases "bad faith or evil intent," the Court in *Bishop* made it clear that they refer to nothing more than the bad purpose or evil motive that necessarily inheres in an intentional violation of a known legal duty.³ Thus, proof of deliberate wrongdoing is all that is required. *United States v. McCorkle*, 511 F. 2d 482, 485 (C.A. 7) (*en banc*), certiorari denied, 423 U.S. 826; *United States v. Pohlman*, 522 F. 2d 974 (C.A. 8) (*en banc*), certiorari denied, 423 U.S. 1049; *United States v. Hawk*, 497 F. 2d 365, 368 (C.A. 9), certiorari denied, 419 U.S. 838. *United States v. Bengimina*, 499 F. 2d 117 (C.A. 8), relied upon by petitioner (Pet. 4), is likewise inapposite. There the court held that an instruction equating "careless disregard" with "willfulness" was reversible error. There was, however, no such instruction given by the district court in this case.⁴

³In distinguishing *Bishop* from this case on its facts (Pet. App. 2a), the court of appeals correctly observed that there is nothing in *Bishop* which permits the introduction of evidence of inability to pay the tax in a failure to file prosecution. Contrary to petitioner's assertion (Pet. 5), the court did not hold that the *Bishop* standard of willfulness is inapplicable in a failure to file case.

⁴The district court charged the jury that "willfully" meant "deliberately, and intentionally, and without justifiable excuse, or with the wrongful purpose of deliberately intending not to file a return which defendant knew he should have filed" (Tr. 333). However, it did not instruct the jury that "[g]ood motive alone is never a defense where the act done or omitted is a crime. So the motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent." Accordingly, this case does not implicate the question presented in our petition for certiorari in *United States v. Pomponio*, 528 F. 2d 247, 249 (C.A. 4), petition for a writ of certiorari pending, No. 75-1667.

For the reasons stated, the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.